

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

DAWN L. PENROD f/k/a DAWN L. MASON

Claimant

VS.

AL CHURCH d/b/a AL'S HOME REPAIR

Respondent

AND

WORKERS COMPENSATION FUND

Docket No. 1,006,741

ORDER

The Workers Compensation Fund appealed the November 15, 2006, Order for Compensation entered by Administrative Law Judge Brad E. Avery.

ISSUES

Respondent (AI Church doing business as AI's Home Repair) agrees claimant was injured on October 1, 2002, in an accident that arose out of and in the course of her employment with respondent. Following a November 14, 2006, preliminary hearing, Judge Avery determined respondent had a payroll that would be reasonably expected to exceed \$20,000. Accordingly, the Judge awarded claimant temporary total disability benefits and medical benefits. The Judge directed the Fund to pay claimant the temporary total disability benefits awarded.

The Workers Compensation Fund (Fund) contends Judge Avery erred. The Fund argues claimant failed to prove respondent had a sufficient payroll to come under the provisions of the Workers Compensation Act. Accordingly, the Fund asks the Board to reverse the November 15, 2006, Order.

Conversely, claimant contends the Order should be affirmed. Claimant argues respondent is attempting to avoid application of the Workers Compensation Act by treating various employees as independent contractors. In essence, claimant contends she has established respondent had an annual payroll greater than \$20,000 and, if not, respondent could have introduced its records to establish the exact amount.

Mr. Church did not file a brief with the Board and, in fact, the Board's notice of briefing schedule that was mailed to him was returned to the Board with a note from the Postal Service that the forwarding order had expired. The administrative file compiled by the Division of Workers Compensation does not indicate that Al Church has provided the Division of Workers Compensation with a new address.

The only issue on this appeal is whether respondent met the salary threshold to come under the provisions of the Workers Compensation Act.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record compiled to date and considering the parties' arguments, the undersigned Board Member finds and concludes:

Al Church owned and operated Al's Home Repair. The record is not entirely clear, but it appears Mr. Church operated the business as a sole proprietorship. In July 2002, claimant testified she began working for Mr. Church. According to claimant, Mr. Church had six people working for him on a full-time basis at that time.

On October 1, 2002, claimant was injured when she was knocked from a ladder while carrying a bundle of shingles. The next day claimant began receiving medical treatment for her injuries. In November 2002, when claimant was given a trial release to return to work, Mr. Church advised claimant he could not employ her anymore.

Respondent admits claimant was an employee at the time of her accident and that the accident arose out of and in the course of her employment. The parties also agreed that for purposes of the preliminary hearing, claimant's average weekly wage was \$270 per week.

Mr. Church paid claimant on a weekly basis while she worked for him from July through September 2002. But, according to claimant, he did not provide her any tax papers for the 2002 tax year.

Mr. Church testified he is not subject to the Workers Compensation Act as his attorney reviewed two years of his checks and determined that Mr. Church was not required by law to carry workers compensation insurance coverage.¹ Mr. Church explained that his method of doing business was to bid work for which he would in turn solicit bids from other individuals and pocket the difference. And for the most part he considered the

¹ At this juncture, no attorney has entered an appearance for Mr. Church or Al's Home Repair.

individuals who worked for him as subcontractors rather than employees. Mr. Church, however, believed he employed about 10 people in 2002 and paid approximately \$6,000 in miscellaneous payroll for mowing grass, cleaning windows and mopping floors. But that amount does not appear to include any payroll for Mr. Church's remodeling on roofing jobs.

At this point it is unclear if Mr. Church provided the materials that his alleged subcontractors used to perform their assigned work. But Mr. Church did provide some of their tools and he controlled the quality of the work that they performed. Mr. Church also paid his workers on a weekly basis. From the evidence presented to date, it appears the alleged subcontractors would be considered employees for purposes of the Workers Compensation Act.

Neither claimant nor Mr. Church produced any cancelled checks, bank records, business records, tax returns, or any other documents regarding the wages that Mr. Church paid. In addition, there is no evidence that the alleged subcontractors maintained independent businesses or possessed their own workers compensation insurance coverage. At this stage of the proceeding, the only evidence regarding respondent's estimated payroll is the testimony of claimant and Mr. Church.

Considering claimant's average weekly wage, the number of individuals who performed work for Mr. Church in 2002, and the manner in which Mr. Church controlled the individuals who performed work on his behalf, the Judge concluded it could be reasonably expected that Mr. Church would have an annual payroll in 2002 that exceeded the \$20,000 threshold.² Accordingly, the Judge found claimant's October 2002 accident was compensable under the Workers Compensation Act. This Board Member adopts that finding and conclusion. Accordingly, the November 15, 2006, preliminary hearing Order for Compensation should be affirmed.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.³ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2005 Supp. 44-551(b)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

WHEREFORE, the undersigned affirms the November 15, 2006, Order for Compensation entered by Judge Avery.

² See K.S.A. 44-505(a)(2).

³ K.S.A. 44-534a.

**DAWN L. PENROD f/k/a
DAWN L. MASON**

DOCKET NO. 1,006,741

IT IS SO ORDERED.

Dated this ____ day of January, 2007.

BOARD MEMBER

c: Russell B. Cranmer, Attorney for Claimant
Al Church d/b/a Al's Home Repair, 1204 East Main St., Marion, KS 66861
Jerry R. Shelor, Attorney for Fund
Brad E. Avery, Administrative Law Judge